IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT PIKEVILLE

PAINTSVILLE HOSPITAL COMPANY, LLC D/B/A PAUL B. HALL REGIONAL MEDICAL CENTER, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD and PHILIP MISCIMARRA, in his official capacity as Chairman of the National Labor Relations Board, Defendants.	Civil Action No. **FILED ELECTRONICALLY**

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(b), Plaintiff Paintsville Hospital Company, LLC d/b/a Paul B. Hall Regional Medical Center ("Plaintiff" or "Paul B. Hall"), moves the Court for a temporary restraining order and preliminary injunction, enjoining Defendants, the federal National Labor Relations Board (the "Labor Board") and Philip Miscimarra, Chairman, National Labor Relations Board, in his official capacity, from proceeding with the unfair labor practice hearing set to commence on March 27, 2017 in consolidated case number 08-CA-167313 (the "Hearing"). The Hearing violates Paul B. Hall's rights under the National Labor Relations Act (the "Act") and the Administrative Procedures Act (the "APA"). The hearing also violates Paul B. Hall's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

An injunction is necessary to prevent the irreparable harm that Paul B. Hall will suffer if the Labor Board opens the Hearing. The administrative proceedings should be enjoined in their entirety until the Labor Board cures the foregoing defects. This Motion is based on Paul B. Hall's Complaint, the affidavit of Deborah Trimble, filed herewith as Exhibit B, and Memorandum in Support, filed herewith. A proposed Temporary Restraining Order has also been filed herewith.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff Paintsville Hospital Company, LLC d/b/a Paul B. Hall Regional Medical Center ("Paul B. Hall") has moved for an immediate injunction and declaratory relief arising from an imminent federal National Labor Relations Board (the "Labor Board") administrative hearing set to commence on March 27, 2017 ("the Hearing"). In the Hearing, the Labor Board seeks far-reaching "corporate-wide" relief pertaining to nurses' union activity to be imposed on dozens of entities not named as respondents in the Labor Board's case ("Unnamed Entities"), including Paul B. Hall. Neither Paul B. Hall nor the Unnamed Entities have been accused of wrongdoing.

The Labor Board chose not to name the Unnamed Entities in its Consolidated Complaint, attached as Exhibit A to the Complaint herein, ("Administrative Complaint"), chose not to serve its Administrative Complaint upon them, and chose not to provide notice to them of the Hearing,

all the while seeking a remedy against them. The Unnamed Entities, therefore, have not been afforded due process rights with respect to the Hearing. The Hearing represents a violation of the Unnamed Entities' rights under the federal National Labor Relations Act (the "Act") and the Administrative Procedure Act ("the APA"), as well as their due process rights under the Fifth Amendment to the United States Constitution. The Hearing must be enjoined until such time as the Labor Board disavows its stated claim of securing a "corporate-wide" remedy applicable to entities not named as Respondents in the Hearing.

II. FACTUAL BACKGROUND

Paul B. Hall operates in the Eastern District of Kentucky. It is separately incorporated, with its own local workforce comprised of approximately 210 individuals. This entity operates an acute care hospital. (Trimble Aff. at ¶¶ 2 and 3). Paul B. Hall has a union, has stable union relationships, and has no history of unfair labor practice difficulty. (Trimble Aff. at ¶ 3). Unfortunately, despite Paul B. Hall's peaceful labor relations, it faces an administrative process where, absent an injunction, its rights will be adjudicated.

The Administrative Complaint which forms the basis for the hearing Paul B. Hall seeks to enjoin involves several parties. It alleges unfair labor practices under the Act against five separately incorporated acute care hospitals ("Respondent Hospitals"). (Administrative Complaint at Exhibit A). Although Paul B. Hall was not named as a Respondent in the case, Paul B. Hall has former and current affiliations with Respondent Hospitals. All five Respondent Hospitals, including Paul B. Hall, were formerly indirectly owned by Community Health Systems, Inc ("CHSI"), a holding company for publicly traded stock.

On or about April 29, 2016, Quorum Health Corporation ("QHC"), based in Brentwood, Tennessee, acquired ownership interests in 38 hospitals from CHSI, including a portion of Paul B.

Hall and three of the Respondent Hospitals: DHSC, LLC, d/b/a Affinity Medical Center ("Affinity"), located in Ohio; Hospital of Barstow, Inc., d/b/a Barstow Community Hospital ("Barstow"), located in California; and Watsonville Hospital Corporation, d/b/a Watsonville Community Hospital ("Watsonville"), also located in California ("the Hospitals"). (Ex. A, Trimble Aff. at ¶ 3). At this time, Paul B. Hall also developed a relationship with QHCCS, LLC ("QHCCS"), an affiliate of QHC. QHCCS, LLC provides consulting services to healthcare entities, including Paul B. Hall. (Trimble Affidavit at ¶ 4).

The current Labor Proceeding involves allegations that the Hospitals, in other states, with different workforces, **prior to being acquired by QHC and prior to being served by QHCCS**, engaged in unfair labor practices. Neither QHC nor QHCCS are alleged therein to have engaged in unfair labor practices. Rather, General Counsel for the Board argues that CHSI had single or joint employment relationships with the Hospitals, now QHC and QHCCS own/serve the Hospitals; therefore, QHC/QHCCS should be responsible for prior wrongdoings on a successor basis. The problem with the Complaint raised herein is that it seeks relief against dozens of other unnamed entities ("the Unnamed Entities"), including Paul B. Hall, against whom unfair labor practices have not been alleged.

The Labor Board alleges that the named Respondents constitute single and joint employers, such that they should be treated as one and should be liable for one another's actions. Paul B. Hall does not challenge the Labor Board's right to attempt to bind the *named Respondents* together, where the named Respondents employ a workforce which has filed a charge. Rather, Paul B. Hall challenges the Labor Board's right to seek a remedial order covering the Unnamed Entities, without affording them due process, particularly where no charge, case or controversy has arisen from their workforces. The Labor Board states its claim against the Unnamed Entities as follows:

> The General Counsel also seeks a **broad remedial order** applicable to…Respondent Quorum Health Corporation, Respondent QHCCS, as successors to Respondent CHSI…, on a corporate-wide basis, **in any and all locations** where they are an employer within the meaning of Section 2(2) of the Act, as part of a **single integrated enterprise, as joint employers**, or otherwise, to **cease and desist** from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act in the manner alleged, or in any other manner, together with any and all relief as may be just and proper to remedy the unfair labor practices alleged. (Ex. A at pp. 54-55).

Paul B. Hall and dozens of other entities with employees may be single or joint employers with QHC or QHCCS, which could bind them to the Labor Board's order, despite having not been named as parties.[1] In sum, General Counsel for the Labor Board would effectively bind their workforces to the order, despite the following undisputed facts: (1) Paul B. Hall has not violated the Act and is not alleged to have violated the Act; (2) Paul B. Hall has not been made a party to the Administrative Complaint; (3) the named owner and named service company for Paul B. Hall (QHC and QHCCS) have not themselves been accused in the Administrative Complaint of violating the Act; and (4) the employment relationships between QHC/QHCCS and Paul B. Hall with the employees working at the hospital in Paul B. Hall have not been pled nor are they otherwise implicated by the Administrative Complaint.

As explained in the Administrative Complaint, entry of a Labor Board order has serious consequences. The Administrative Complaint's prayer for relief illustrates the types of remedies the Labor Board may order, such as mandated reading of notices to employees, mailing notices to employees, paying damages to former and current employees, bargaining-related orders, access to entity property, and bulletin board posting of notices, together with generic claims for "all relief as

[1] The Labor Board recently expanded joint employment law to rule that mere "reserved authority," even if not exercised, by one entity over another can support joint employment. *Browning Ferris-Industries*, 362 NLRB No. 186 (2015). The expanded authority the Labor Board attempted to grant itself, combined with nation-wide remedies across all joint employers, even without naming all such entities as parties, has the potential for vitiating any semblance of corporate structures and due process.

may be just and proper." (*Id.* at 57). Different entities deemed single employers have joint and several monetary liability and compliance responsibility for one another's actions. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987). In addition, the entry of a broad-based cease and desist order raises obvious concerns about future contempt actions and the reversal of personnel decisions through direct contempt proceedings rather than through a deliberative administrative process.

III. ARGUMENT

The decision of whether to issue a temporary restraining order/grant a preliminary injunction turns on four factors: "(1) the plaintiff's likelihood of success on the merits; (2) the likelihood that the plaintiff will suffer irreparable harm without the preliminary injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the injunction serves the public interest." *Winter v. Wolnitzek*, 56 F. Supp. 3d 884, 893 (E.D. Ky. 2014) *citing Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir.2013). The decision to grant a motion for a temporary restraining order is within the discretion of the district court. *Oliver v. Sch. Dist. of City of Kalamazoo, Kalamazoo Cty.*, 448 F.2d 635, 636 (6th Cir. 1971). As explained below, each factor favors the entry of a restraining order/temporary injunction.

A. Paul B. Hall Will Succeed on the Merits.

1. Sound Precedent Supports the Requested Relief.

Labor Board overreach can be enjoined. In *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2014), the Fourth Circuit affirmed a District Court injunction preventing the Labor Board from illegally mandating that employers post pro-union notices. Although such employers had not been accused of violating the Act, the order to post the notices would, absent an injunction, have been applied to them. The Fourth Circuit specifically held that the Labor Board may not take an action beyond its "defined reactive roles in addressing unfair

labor practice charges and conducting representation elections upon request." *Id.* at 154. The Court further held that the Labor Board has "no function or responsibility . . . not predicated upon the filing of an unfair labor practice charge or a representation petition." *Id.*

Chamber of Commerce applies to the instant case because, similarly, Paul B. Hall's employees have not alleged unfair labor practices, nor have they filed for elections. No case exists, yet the Board seeks an order which would necessarily apply to Paul B. Hall, the Unnamed Entities, and their employees, as joint or single employers with QHCCS or QHC. The Labor Board, therefore, has no rightful function or responsibility with respect to Plaintiff or its employees. It's administrative actions to the contrary should be enjoined.

The Ninth Circuit has held that a corporate entity not named as a Respondent in a Labor Board action cannot be subject to the resulting order's enforcement. In *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089, 1098 (9th Cir. 1999), the Ninth Circuit rejected a Labor Board attempt to enforce an order against a hospital not named in the actual complaint but still closely tied to the entities named in the underlying action. The Court held,

> Due process is violated when a separate corporate entity has no notice that its interests will be adjudicated and that it will be bound by the order that the NLRB issues. Although "[a]ctions before the Board are not subject to technical pleading requirements that govern private lawsuits[,]" *NLRB v. IBEW*, 827 F.2d 530, 534 (9th Cir. 1987), this does not allow adjudication of a party's interests without formal notification to that party. *See NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292, 295-96 (2d Cir. 1996) (even if party knew of allegations of alter ego status and of effort to include them in the proceedings, formal service of complaint was still required). Therefore, the Hospital is not properly named as a party that is bound by the NLRB's enforcement order.

Id. at 1098. Here, as in *Northern Montana*, the Labor Board impermissibly seeks a remedy against entities not made a party to its proceeding.

In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Supreme Court specifically held that a District Court may provide a remedy to parties threatened by an unlawful Labor Board process. *Id.* at 185–

88 ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). *See also Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) (explaining *Leedom* and instructing that it applies where a violation of rights does not lend itself to "a meaningful and adequate opportunity for judicial review."). *See, e.g.*, *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397 (6th Cir. 2002) ("[I]n *Leedom*, the Supreme Court found a litigant may bypass available administrative procedures where there is a readily observable usurpation of power not granted to the agency by Congress." (citation omitted)); *Saginaw Chippewa Indian Tribe of Mich.*, 838 F. Supp. 2d 598, 603 (E.D. Mich. 2011) (Entities impacted by Labor Board actions need not exhaust administrative options upon "a showing that the Board acted in excess of its delegated powers *and* that the aggrieved party would be 'wholly deprived' of its statutory rights.") (quoting *Detroit Newspaper Agency*, 286 F.3d at 397). An injunction may issue where no "meaningful and adequate opportunity for judicial review." *Saginaw*, 838 F. Supp. 2d at 603 (citing *MCorp*, 502 U.S. at 43); *see also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 459, 462 (1938) (requiring exhaustion of the administrative process under the Act, but opening the door to a different outcome if respondent status, with the opportunity to "answer the complaint" and "to introduce evidence" has not been provided).

What has become known as the "*Leedom* exception" to the preference for administrative exhaustion applies here. Paul B. Hall can't be forced to exhaust an administrative process when the Board has chosen not to make it and similarly situated Unnamed Parties a part of that process. Its statutory rights to defend the administrative action will have been ameliorated. Moreover, the Board will have acted outside its delegated powers by attempting to impose an order on a single or joint relationship (i.e. Paul B. Hall and QHC or QHCCS) which has not been the subject of a

charge, has not been named as a party, and has not been afforded due process. As contemplated in *Leedom*, absent an injunction, the deprivation of rights in this case will be whole and immediate. The moment the Hearing opens, and as it continues, the Unnamed Entities will immediately suffer an irrevocable deprivation of due process. They will not have appeared. They will not have been afforded the right to present evidence about the alleged unfair labor practices. They will not have been able to argue against single or joint employment status therein.

Absent an injunction, the Unnamed Entities will have no meaningful and adequate opportunity for judicial review of the administrative process. They will not have participated in that process. They will have no right of appeal to the Labor Board from an administrative law judge's decision and no automatic right to appeal the Labor Board's order to the Circuit Court of Appeals, as they will not have been named as parties. Most importantly, even if such an appeal were possible, they would not have been afforded the opportunity to make a record to fully support the appeal.[2] All defenses on the merits will have been waived, leaving Unnamed Entities such as Paul B. Hall with two options. They can comply with an order effectively entered against their respective workforces as an alleged single/joint employer, knowing any failure to do so can result in joint or several liability, or they can wait for an enforcement or contempt action to come. This is what happens to entities who litigate and lose, not to entities who were never made parties in the first place and were never alleged to have engaged in wrongdoing. And it's exactly what this Labor Board General Counsel, whose term expires in November 2017, would visit upon corporate entities innocent of wrongdoing.

[2] Cases like *Amerco v. NLRB*, 458 F. 3d 883 (9th Cir. 2006), provide further support for applying the *Leedom* exception to this case. While a named party to an unfair labor practice proceeding may be required to stay the administrative course and utilize the appeals process, no such recourse exists here, as neither Paul B. Hall nor any of the Unnamed Entities have been named as respondents in the Administrative Complaint.

2. The Labor Board's Misuse of The Single or Joint Employer Theory, As Applied to Non-Parties, Violates Due Process, the Act, and Other Applicable Law.

Consistent with due process, entities against which a remedial order is sought must be named, including joint employer cases.[3] With respondent status, each entity can present its own evidence on joint employer issues, as well as evidence to defend against the underlying unfair labor practices. In a joint employment case, the issue involves identifying the employer which employed the *workers who have been subjected to the alleged unfair labor practices.* The employer could be a sole entity or multiple entities constituting a single/joint employer of those employees, all of whom must be named to provide due process.

For example, if a workforce at a location is subjected to unfair labor practices, the "employer" of those workers could be a named direct on-site employer (employer entity "A") and a named secondary respondent joint employer (employer entity "B"), who together make up the "A-B" joint relationship of the *affected workers* who have been subjected to the unfair labor practices. In subsequent cases arising from newly alleged unfair labor practices at a different location involving a different entity and a different workforce (entity "C"), the Labor Board may try to show that employer entity B is *also* in a joint employer with C, for a "B-C" joint relationship. But in such cases, entities B and C have due process rights to appear and contest any such finding.

In stark contrast to the above examples, with respect to the Administrative Complaint herein, the Labor Board seeks to by-pass due process rights of dozens of similarly situated C

[3] *See., e.g., Indiana Temporary Servs.*, 340 NLRB No. 101 (2003); *Skill Staff of Colo. & Cobb Mech. Contractors*, 331 NLRB No. 097 (2000); *Branch Int'l Servs., Inc.*, 327 NLRB No. 050 (1998); *Hobbs & Oberg Mining Co.*, 316 NLRB No. 95 (1995); *Dunkin' Donuts Mid-Atlantic Distribution Ctr., Inc.*, 363 F.3d 437 (D.C. Cir. 2004); *Mammoth Coal Co.*, 358 NLRB No. 159 (2012); *Spurlino Materials, LLC*, 357 NLRB No. 126 (2011); *Saigon Gourmet Restaurant*, 353 NLRB No. 110 (2009); *Lebanite Corp.*, 346 NLRB No. 072 (2006); *Thalbo Co.*, 323 NLRB No. 105 (1997).

entities by applying a "corporate-wide" order to all of them, without naming them as respondents. General Counsel knew he could not name Paul B. Hall directly, as it had engaged in no wrongdoing and no charge supported such relief. Prosecutorial zeal led to an attempt to cover Unnamed Entities anyway, without a charge and without due process. In the absence of a charge with respect to its employee population, an employer entity may not be subjected to posting, reading, mailing, or a cease and desist order, on property it owns, with people it employs.

The General Counsel's approach, a clear misuse of joint/single employer doctrines, violates the Act and the Labor Board's own regulations. 29 C.F.R. §§ 101.4 & 102.14 (a party is entitled to receive a copy of the charge); §§ 101.8 & 102.15 (complaints must be served on all parties); § 101.11 (a party must be served with an administrative law judge's decision); § 101.16 (a party has the right to participate in compliance proceedings); §§ 102.16, 102.17 (parties have the right to object to hearing dates and to file motions); § 102.45 (parties have the right to appeal to the Labor Board). Indeed, the necessity of a Charge, Complaint and appeals process have been prescribed in the Labor Act itself. 29 U.S.C. 160 (b)-(f). The Labor Board has satisfied none of these statutory requirements.

Similarly, the Labor Board has violated the federally mandated APA. 5 U.S.C. § 554(b) of the APA requires that: "[p]ersons entitled to notice of an agency hearing shall be timely informed of: (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted." As stated by the Second Circuit Court of Appeals in *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292, 294 (2d Cir. 1996),

> Fundamental to our legal system is the requirement that, before a judgment or enforceable order is entered against a person, some form of pleading, giving notice of the charges, must be served upon that person. Unfair labor practice proceedings begin with service of a complaint upon the party charged. The complaint must

> contain notice of the charges and of a hearing to determine them. *See NLRB v. Chelsea Labs., Inc*., 825 F.2d 680, 682 (2d Cir. 1987); *NLRB v. Coca Cola Bottling Co. of Buffalo*, 811 F2d 82, 87 (2d Cir. 1987). Notice "must inform the respondent of the acts forming the basis of the complaint." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990).

Id. at 294. Once again, the Labor Board has satisfied none of these requirements.

The Labor Board's approach also violates basic Constitutional requirements of due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Business organizations, like individuals, possess due process rights. *See Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953 (1980). "As a general proposition, the NLRB may not find that an unfair practice exists without first affording the alleged violator notice and an opportunity for a hearing. This requirement is primarily a matter of due process." *NLRB v. Coca Cola Bottling Co. of Buffalo, Inc*., 811 F.2d 82, 87 (2d Cir. 1987). The Labor Board's Complaint in this case seeks to violate these Constitutional rights by demanding a "corporate-wide" order against Unnamed Entities.

The Labor Board's intentions of applying single and joint employer theories to multiple entities equates to an effort to pierce corporate veils, in which cases it would never be suggested that parties subject to a court order should not have been named as defendants. The Kentucky Supreme Court has cautioned that "Courts should not pierce corporate veils lightly[.]" *Inter-Tel Techs., Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152, 168 (Ky. 2012). A veil can be pierced, but it can only be pierced when the proper parties are before the Court. In other words,

the veil cannot be pierced without affording a specific entity or person due process. The Labor Board should be held to the same standard here.

Further, the Labor Board cannot rely on the single employer doctrine to establish liability in disregard of corporate formalities. *See, e.g.*, *NLRB v. Deena Artware*, 361 U.S. 398 (1960); *Package Serv. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *NLRB v. Int'l Measurement*, 978 F.2d 334 (7th Cir. 1992); *Esmark v. NLRB*, 887 F.2d 739 (7th Cir. 1989). Due process requires the naming of the entities and relationships who will be ordered to take an action, along with a charge from the employees of the alleged joint/single entity. The assertion of this newly cast form of single/joint employer, a clear attempt to circumvent due process, should be enjoined.

B. Paul B. Hall Meets the Remaining Elements to Support Injunctive Relief.

1. Without the Restraining Order/Preliminary Injunction Paul B. Hall Will Suffer Immediate, Irreparable Harm.

As explained above with respect to the *Leedom* exception, the harm at issue herein will be immediate and irreparable as the hearing opens and progresses. A record will have been made therein, in the absence of the Unnamed Entities. Due process will have been denied. Defenses will be waived. Put simply, one cannot defend if one has not been named as a respondent to an administrative proceeding. Without specific, interim relief, dozens of Unnamed Entities will be similarly stripped of their rights.

In *Winter v. Wolnitzek*, 56 F. Supp. 3d 884 (E.D. Ky. 2014), the Court considered an emergency Motion for Temporary Restraining Order and Preliminary Injunction sought by a candidate for judicial election in Campbell County, Kentucky. *Winter*, 56 F. Supp. 3d at 890. The movant in *Winter* sought the temporary restraining order to enjoin the enforcement of certain Kentucky Judicial Conduct Commission Canons which prohibited a judicial candidate from identifying himself or herself as a member of a political party. *Id.* The movant believed the Canons

at issue to be an unconstitutional infringement of his right to free speech and wanted to send out mailers to prospective voters that identified himself as a Republican. *Id*. The Court in *Winte*r granted the movant's emergency motion. *Id*. at 901. In so granting, the Court recognized that part of the irreparable harm to the movant was the fact that election day was fast approaching, and that absent the injunction, the movant would have risked sanctions form the Judicial Commission if he sent the mailers. *See Winter,* 56 F. Supp. 3d at 901. Like *Winter*, the commencement of the Hearing in this matter is days away. Irreparable harm will result absent the preliminary injunction.

2. The Injunction Does Not Cause Harm to Others and It Serves The Public Interest.

The Labor Board will claim delay, but as demonstrated above, the loss of Constitutional rights constitutes inordinate and irreparable harm which exceeds concerns about delay. Many of the alleged unfair labor practices allegedly occurred several years ago. Further, minor delay to cure the Labor Board's overreach will result in no harm. Even if this factor did "slightly favor" the Labor Board, which it does not, like the case in *Winter*, it is "outweighed by the other preliminary-injunction factors." *Winter,* 56 F. Supp. 3d. at 901.

The final factor of public interest clearly favors Paul B. Hall. The rights vindicated in this action include those held sacrosanct by the American system of jurisprudence. As such, granting the requested relief strongly serves public interests on an issue of national labor relations significance. Vindicating an entity's Constitutional rights serves the public interest. *See Winter*, 56 F. Supp. 3d. at 901, *citing G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir.1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

IV. CONCLUSION

The Labor Board can attempt to cover multiple entities with an order, but to do so it must name all such entities as respondents and afford them the right to defend. Moreover, for such a remedy, an unfair labor practice case must exist against the employer (*i.e.*, alleging named entities A and B constitute a joint or single employer which committed an unfair labor practice against the employees of joint or single employer A and B).

Left unchecked, by not having to name all entities, the Labor Board can serially sue or cover thousands of entities at once, without having satisfied the attendant "burden" of litigating with them. As a by-product, the Labor Board would chill the exercise of employer rights and punish innocent parties. Prosecutorial zeal, a government desire for expediency, and a quest for impermissible punitive measures must yield to due process and statutory rights. Based on the foregoing, Paul B. Hall respectfully submits that the requested temporary restraining order and preliminary injunction be issued.

Respectfully submitted,

/s/ Robert D. Hudson
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Counsel for Plaintiff Paintsville Hospital Company, LLC d/b/a Paul B. Hall Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2017, I filed the foregoing with the Clerk of the Court, and that a copy of the foregoing will be served to the parties receiving a summons in this matter as a part of the materials filed with the Complaint. In addition, a copy is also being sent by fax, on this date, March 22, 2017, to the following:

National Labor Relations Board
C/O Office of the U.S. Attorney
Eastern District of Kentucky
ATTN: Civil Process Clerk
260 W. Vine Street, Suite 300
Lexington, KY 40507-1612
Fax No.: 859-233-2533

/s/ Robert D. Hudson
FROST BROWN TODD LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT PIKEVILLE

PAINTSVILLE HOSPITAL COMPANY, LLC D/B/A PAUL B. HALL REGIONAL MEDICAL CENTER, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD and PHILIP MISCIMARRA, in his official capacity as Chairman of the National Labor Relations Board, Defendants.	)	Civil Action No. **FILED ELECTRONICALLY**

TEMPORARY RESTRAINING ORDER

Plaintiff Paintsville Hospital Company, LLC d/b/a Paul B. Hall Regional Medical Center ("Paul B. Hall") has moved the Court for a temporary restraining order enjoining Defendants, the federal National Labor Relations Board (the "Labor Board") and Philip Miscimarra, Chairman, National Labor Relations Board, in his official capacity, from proceeding with the unfair labor practice hearing set to commence on March 27, 2017 in consolidated case number 08-CA-117890 ("the Hearing"). The Court has considered the Motion, the Memorandum in Support filed with the Motion, the allegations of the Complaint, the Labor Board's Administrative Complaint, the affidavit of Deborah Trimble, argument, and applicable law. Based on the findings of fact and conclusion of law recited herein, the Court **GRANTS** the Motion.

As set forth more fully below,

1. Paul B. Hall has shown a likelihood of success on the merits.

2. A restraining order is necessary to prevent the irreparable harm that Paul B. Hall will suffer if the Labor Board opens the Hearing.

3. An injunction will not cause substantial harm to others.

4. Issuing an injunction is in the public interest.

5. Accordingly, the administrative proceedings are enjoined in their entirety until the earlier of (1) such time as the Labor Board cures the defects identified below; (2) such time as a hearing occurs on Paul B. Hall's Motion for a Preliminary Injunction; or (3) 14 days from the entry of this Order.

FINDINGS OF FACT

6. According to the Labor Board Complaint ("Administrative Complaint"), the Labor Board seeks far-reaching "corporate-wide" relief to be imposed on entities not named as respondents in the Labor Board's case ("Unnamed Entities"), including Paul B. Hall. The Labor Board Complaint accuses neither Paul B. Hall nor the Unnamed Entities of wrongdoing.

7. In the Administrative Complaint, Region 8 of the Labor Board, through its Regional Director, alleges unfair labor practices under the Act five seven separately incorporated acute care hospitals ("Respondent Hospitals"). Respondent Hospitals operate in different parts of the country with their own local workforces and their own local executives. Three of the Respondent Hospitals were formerly owned by from Community Health Systems, Inc ("CHSI"). They include DHSC, LLC, d/b/a Affinity Medical Center ("Affinity"), located in Ohio; Hospital of Barstow, Inc., d/b/a Barstow Community Hospital ("Barstow"), located in California; and Watsonville Hospital Corporation, d/b/a Watsonville Community Hospital ("Watsonville"), also located in California. CHSI was also named a Respondent in the Administrative Complaint.

8. On or about April 29, 2016, Quorum Health Corporation ("QHC"), based in Brentwood, Tennessee, acquired 38 hospitals from CHSI, including Paul B. Hall. QHC now owns a portion of Paul B. Hall. At the time QHC purchased an ownership interest in Paul B. Hall, it also purchased Affinity, Barstow, Watsonville (the "Hospitals")

9. QHCCS, LLC ("QHCCS") is a wholly owned subsidiary of QHC. QHCCS provides assistance, including consulting, to entities owned by QHC and to other healthcare-related entities, including Paul B. Hall and the Hospitals.

10. The current Labor Proceeding involves allegations that the Hospitals, prior to being acquired by QHC and prior to being served by QHCCS, engaged in unfair labor practices. Neither QHC nor QHCCS are alleged therein to have engaged in unfair labor practices. Rather, General Counsel for the Board argues that CHSI had single or joint employment relationships with the Hospitals; QHC and QHCCS currently own/serve the Hospitals; therefore, QHC/QHCCS should be liable on a successor basis. (Administrative Complaint at x).

11. Paul B. Hall operates in the Eastern District of Kentucky and is separately incorporated, with approximately 210 employees. The workforces of Paul B. Hall and the Unnamed Entities have not had unfair labor practice charges filed against them which will be heard as part of the Administrative Complaint. The unfair labor practices allegedly took place in other states with Respondent Hospitals' employees.

12. In its Administrative Complaint, the Labor Board alleges that the named Respondents constitute single and joint employers, such that they should be treated as one and should be liable for one another's actions. Paul B. Hall does not challenge the Labor Board's right to attempt to bind the *named Respondents* together. Rather, Paul B. Hall challenges the Labor Board's right to seek a remedial order covering the Unnamed Entities without affording them due

process, and without unfair labor practice charges having been filed against them. Within the Labor Board's six page prayer for relief, it outlines its claim against the Unnamed Entities.

> The General Counsel also seeks a **broad remedial order** applicable to…Respondent Quorum Health Corporation, Respondent QHCCS, as successors to Respondent CHSI…, on a corporate-wide basis, **in any and all locations** where they are an employer within the meaning of Section 2(2) of the Act, as part of a **single integrated enterprise, as joint employers**, or otherwise, to **cease and desist** from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act in the manner alleged, or in any other manner, together with any and all relief as may be just and proper to remedy the unfair labor practices alleged. (Ex. A at pp. 54-55).

13. Counsel for the Labor Board's General Counsel argues it would have this order apply to potential single and joint employers such as Paul B. Hall, notwithstanding the following undisputed facts: (1) Paul B. Hall has a stable union relationship and has no history of violating the Act; (2) Paul B. Hall has not been made a party to the Administrative Complaint; (3) an owner and service company for Paul B. Hall (QHC and QHCCS), who are parties to the Administrative Complaint, are not themselves accused in the Administrative Complaint of violating the Act; and (4) the employment relationships between QHC/QHCCS and Paul B. Hall with the employees working at the hospital in Paul B. Hall have not been pled nor and they are not otherwise the subject of charges set forth in the Administrative Complaint.

14. By naming QHC and QHCCS, which have ownership or management connections with Paul B. Hall and the Unnamed Entities, and by seeking remedies on a "corporate-wide" basis, the Labor Board clearly seeks a remedial order covering Paul B. Hall and the Unnamed Entities. The single and joint employment relationships alleged necessarily involve multiple entities, yet those entities have not been named as party Respondents.

15. Subjecting Paul B. Hall and the Unnamed Entities to a Labor Board remedial order has serious consequences. The Administrative Complaint's prayer for relief illustrates the types

of remedies the Labor Board may order, such as mandated reading of notices to employees, mailing notices to employees, paying damages to former and current employees, bargaining-related orders, access to entity property, and bulletin board posting of notices, together with generic claims for "any and all relief as may be just and proper," to name a few. (*Id.* at 57). Different entities deemed single employers also have joint and several monetary liability and compliance responsibility for one another's actions. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987).

16. An interest in due process arises from the immediate consequences of a remedial order. Clearly, the Labor Board seeks to order QHCCS to secure compliance at entities it serves, but does not own. The Labor Board seeks to order QHC to secure compliance at entities it indirectly owns, in whole or in part. These Unnamed Entities have an independent and separate existence and own their property/operations, yet would be subject to orders arising from actions hundreds of miles away by different hospital entities with which they have no connection. Paul B. Hall, justifiably, strenuously objects to having its remedial fates linked to other entities in this fashion.

17. An interest in due process arises from contempt concerns. Contrary to accepted legal theories associated with piercing a corporate veil, a corporate-wide order could result in the Labor Board haling, directly or indirectly, the Unnamed Entities into court for contempt with respect to any alleged future violations of the Labor Act, even though the Unnamed Entities have not engaged in prior alleged wrongdoing. With the broad cease and desist order sought (no further violations of the Labor Act), any future violation by any entity could be a breach of such an order. This objective is contrary to the Supreme Court's mandate that the Labor Board refrain from punitive measures. *Carpenters Local 60 (Mechanical Handling) v. NLRB*, 365 U.S. 651, 655 (1961).

18. An injunction of the type sought here is appropriate in cases of Labor Board overreach. In *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2014), the Fourth Circuit affirmed a District Court injunction preventing the Labor Board from illegally mandating that employers post pro-union notices. Although such employers had not been accused of violating the Labor Act, the order to post the notices would, absent an injunction, have been applied to them. Absent an immediate restraining order, it is likely that Plaintiffs could be deprived a meaningful opportunity to be heard. If the Hearing commences, no meaningful and adequate opportunity for judicial review will exist. The moment the Hearing opens, Unnamed Entities, like Plaintiff, will immediately suffer an irrevocable deprivation of due process. It will not have appeared. It will not have been afforded the right to present evidence as to alleged unfair labor practices, nor will it have been afforded the right to argue against single or joint employment status. It will have no right of appeal to the Labor Board from an administrative law judge's decision and no right to appeal to the Circuit Court of Appeals, as Paul B. Hall will not have been named as a party. And even if such an appeal were possible, Paul B. Hall would not have been afforded the opportunity to make a record to support such an appeal.

CONCLUSIONS OF LAW

1. An entity not named as a Respondent in a Labor Board action cannot be subject to the resulting order's enforcement. *N. Mont. Health Care Ctr. v. NLRB*, 178 F.3d 1089, 1098 (9th Cir. 1999).

2. In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Supreme Court specifically held that a District Court may provide a remedy to parties about to be affected by an unlawful Labor Board process. *Id.* at 185–86.

3. Entities impacted by Labor Board actions need not exhaust administrative options upon "a showing that the Board acted in excess of its delegated powers *and* that the aggrieved party would be 'wholly deprived' of its statutory rights." *Saginaw Chippewa Indian Tribe*, 838 F. Supp. 2d 598, 603 (E.D. Mich. 2011) (quoting *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397 (6th Cir. 2002)). "To establish [the administrative] exhaustion requirement does not apply, [an aggrieved party] must demonstrate that it has no 'meaningful and adequate opportunity for judicial review.'" *Id.* (quoting *Bd. of Governors of Fed. Reserve Sys. v. MCorp*, 502 U.S. 32, 43 (1991)); *see also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 459, 462 (1938) (requiring exhaustion of the administrative process under the Labor Act, but opening the door to a different outcome if respondent status, with the opportunity to "answer the complaint" and "to introduce evidence" had not been provided). The *Leedom* exception to administrative exhaustion applies in this case because Paul B. Hall has shown a substantial likelihood of a denial of their and the Unnamed Entities' due process rights.

4. A District Court also may enjoin the Labor Board when it acts outside its "defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request." *Chamber of Commerce of the United States*, 721 F.3d at 154 (4th Cir. 2014). The Labor Board has "no function or responsibility…not predicated upon the filing of an unfair labor practice charge or a representation petition." *Id.* In this case, it appears that Paul B. Hall's employees have neither alleged unfair labor practices nor filed for elections. No case exists, yet the Labor Board seeks an order which would apply to Paul B. Hall and other Unnamed Entities, and their employees. Without an immediate injunction, there is a substantial likelihood that the Labor Board would take actions that it lacks authorization to take.

5. Absent an injunction, the Labor Board could obtain an order that will violate the Labor Act and its own regulations. *See, e.g.*, 29 C.F.R. §§ 101.4 & 102.14 (a party is entitled to receive a copy of the charge); §§ 101.8 & 102.15 (complaints must be served on all parties); § 101.11 (a party must be served with an administrative law judge's decision); § 101.16 (a party has the right to participate in compliance proceedings); §§ 102.16 & 102.17 (parties have the right to object to hearing dates and to file motions); § 102.45 (parties have the right to appeal to the Labor Board). The Labor Act provides no basis for the Labor Board to adjudicate a charge that has not been made against non-parties. *Id.* § 160(a). Indeed, the necessity of a Charge, Complaint and appeals process have been prescribed in the Labor Act itself. 29 U.S.C. 160 (b)–(f). The Labor Board has satisfied none of these statutory requirements.

6. Per 5 U.S.C. § 702, federal governmental agencies are not immune from claims for injunctive relief.

7. The Hearing represents a likely imminent violation of Paul B. Hall's and the Unnamed Entities' rights under the federal National Labor Relations Act ("the Labor Act"), the Administrative Procedure Act ("the APA"), as well as their due process rights under the Fifth Amendment to the United States Constitution. Title Five, Section 554(b) of the United States Code requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of: (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted." *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292, 294 (2d Cir. 1996).

8. The Labor Board cannot rely on the single employer doctrine to establish liability in disregard of corporate formalities. *See, e.g., NLRB v. Deena Artware*, 361 U.S. 398 (1960);

Package Serv. v. NLRB, 113 F.3d 845 (8th Cir. 1997); *NLRB v. Int'l Measurement*, 978 F.2d 334 (7th Cir. 1992); *Esmark v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

9. The Labor Board's approach immediately threatens Paul B. Hall's and the Unnamed Entities' basic Constitutional due process rights. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth . . . Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Business organizations, like individuals, possess due process liberty interests. *Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953, 961–62 (1980). The Labor Board's Complaint shows that the Labor Board may imminently violate these Constitutional rights by demanding a "corporate-wide" order against Paul B. Hall and the Unnamed Entities, who will not have appeared and will lack foundational procedural rights.

10. Each of the four factors the Court considers with respect to interim relief heavily favor Paul B. Hall: "1) the plaintiff's likelihood of success on the merits; (2) the likelihood that the plaintiff will suffer irreparable harm without the preliminary injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the injunction serves the public interest." *Winter v. Wolnitzek*, 56 F. Supp. 3d 884, 893 (E.D. Ky. 2014) *citing Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir.2013). The decision to grant a motion for a temporary restraining order is within the discretion of the district court. *Oliver v. Sch. Dist. of City of Kalamazoo, Kalamazoo Cty.*, 448 F.2d 635, 636 (6th Cir. 1971).

11. Paul B. Hall asserts statutory and Constitutional claims for declaratory judgment in their Administrative Complaint herein, accompanied by a third claim for injunctive relief. Paul B. Hall is likely to prevail on both underlying claims.

12. Absent an immediate injunction, Paul B. Hall and the Unnamed Entities would suffer immediate and irreparable harm. Paul B. Hall's and the Unnamed Parties' opportunity to defend at the Hearing will be irrevocably lost if not ensured in advance, and it cannot be re-created via another process. For the same reasons this case may be filed and should be heard under *Leedom*, the injury herein becomes irreparable and not subject to vindication through the administrative process. Paul B. Hall and the Unnamed Parties cannot defend if they are not named as defendants or respondents to the Labor Board's administrative proceeding. Without specific, interim relief, Paul B. Hall, along with dozens of Unnamed Entities will be stripped of their rights.

13. The loss of Constitutional rights constitutes inordinate and irreparable harm to Paul B. Hall. On the other hand, a slight delay for the purpose of removing due process violations will result in no harm to the Labor Board. The Labor Board can proceed to hearing expeditiously if it amends its Administrative Complaint to disavow all intent to adjudicate the rights, status or remedies connected in any way to Paul B. Hall and the Unnamed Entities, via single employment, joint employment, or otherwise.

14. Vindicating an entity's Constitutional rights serves the public interest. *See Winter*, 56 F. Supp. 3d. at 901, *citing G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir.1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). The rights vindicated in this action include those held sacrosanct by the American system of jurisprudence. As such, granting the requested relief strongly serves public interests on an issue of national labor relations significance.

15. Any delay in enjoining the Hearing will put Paul B. Hall's and the Unnamed Entities' constitutional rights at undue risk of permanent loss. Paul B. Hall and the Unnamed Entities have no adequate procedural rights, so the Court enjoins the Hearing to ensure these rights are not lost in the time necessary to serve the Labor Board and convene a preliminary hearing.

Based on the foregoing, it is **HEREBY ORDERED**:

The Hearing and its related administrative proceedings shall be suspended and enjoined in their entirety until the earlier of (1) such time as the Labor Board cures the defects identified above; (2) such time as a hearing occurs on Paul B. Hall's Motion for a Temporary Injunction; or (3) 14 days from the entry of this Order, unless extended.

As security for this Temporary Restraining Order, Paul B. Hall shall post security in the amount of $_____.

This Temporary Restraining Order shall remain in full force and effect until _____, 2017 or such other time as the Court orders or the parties consent.

_____
United States District Court Judge